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No. 88-602 (3)

IN THE

Supreme Court of the United States

October Term, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

NEW YORK STATE PUBLIC SERVICE COMMISSION BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Question Presented

Does a litigant who is barred as a matter of State law from collaterally attacking the merits of a state agency ruling raise a reviewable federal question by alleging, without basis, that the agency ruling misinterpreted a federal statute?

The answer is no.

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Allied Chemical (Allied) has petitioned for a writ of certiorari to review a unanimous New York State Court of Appeals' decision that precluded Allied from collaterally attacking a 1985 New York Public Service Commission decision. The thrust of Allied's petition is a contention that the Commission's 1985 ruling should not have been given *res judicata* effect in Allied's breach of

contract action against Niagara Mohawk Power Corporation (Niagara Mohawk) because the ruling allegedly involved an erroneous interpretation of federal law.

This brief demonstrates that certiorari is not warranted because 1) Allied's quarrel with the New York State Court of Appeals' *res judicata* holding turns solely on state law; 2) Allied's PURPA argument is, in any event, specious; and 3) there is no conflict on this matter between Federal Circuits or states.

Statement of Facts

The Enactment of PURPA

Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA) as part of a comprehensive response to a nation-wide energy crisis (Pub. L. 95-617, Stat. 3144). See, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983); *FERC v. Mississippi*, 456 U.S. 742, 745, reh'g denied, 458 U.S. 1131 (1982). Among other things, PURPA directed FERC to promulgate rules requiring electric utilities to offer to purchase energy from qualifying small power production and cogeneration facilities (16 U.S.C. Section 824a-3(a)).[1]

In 1980, FERC implemented PURPA by promulgating regulations, which provided, *inter alia*, that owners of facilities constructed after the enactment of PURPA would be able to charge rates based on the costs utilities avoided by not having to generate the power which they purchased from them. *See*, PURPA §210(a); 16 U.S.C. 824 a-3(d). However, FERC made it absolutely clear that owners of qualifying facilities constructed before that date were *not entitled* to "avoided cost" rates (45 Fed. Reg. 12214, 12223).[2]

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[1] PURPA Section 201 defines "small power production" facilities as those that produce electric power from biomass, waste or renewable resources (such as water, solar energy or wind) and that have a production capacity of not more than 80 megawatts. 16 U.S.C. §767(17)(a) (Supp. V). It defines a "cogeneration facility" as a facility that produces both electric energy and steam or some other form of useful energy (such as heat). 16 U.S.C. §796(18)(a) (Supp. V).

[2] FERC also indicated that state regulatory agencies, in implementing its regulations, *could*, as a matter of discretion, allow "old" (pre-PURPA) capacity rates based on avoided costs (45 Fed. Reg. 12215-12216, 12223).

Allied's Contract with Niagara Mohawk

In 1981, Allied and Niagara Mohawk agreed that Allied would sell Niagara Mohawk power generated at its Geddes facility. The parties recognized that because Geddes was constructed well before the enactment of PURPA, its power would be sold for a price equal to Niagara Mohawk's *average fossil* fuel cost per kilowatt hour. Alternatively, the contract specified that Niagara Mohawk could be required to pay an "applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party."

Niagara Mohawk's Avoided Cost Tariff and the PSC's Ruling

Two years later, Niagara Mohawk filed an avoided cost (SC-6) tariff with the Public Service Commission to establish the rate that owners of "new capacity" could charge. Although its Geddes facility was "old capacity," Allied presented Niagara Mohawk with a demand for SC-6 tariff rates.

Niagara Mohawk rejected Allied's demand and both parties petitioned the Commission for a declaratory ruling resolving the dispute. After reviewing the arguments, the Commission, referencing FERC's regulations distinguishing "old" from "new" capacity, concluded that because the Geddes facility was "old capacity", Allied was not entitled to Niagara's avoided cost (SC-6) tariff rates.[3]

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[3] Allied complains that the Commission's declaratory judgment was issued "without any hearing" (Allied, 6), but Allied never requested a hearing (See, Petition, App. C-4). Moreover, inasmuch as the petition simply raised an interpretation of FERC regulations, no hearing was required.

The Commission also instituted a generic proceeding to determine on a prospective basis whether old capacity would be entitled eventually to rates approaching full avoided costs.[4] On February 14, 1986, it established a phase-in procedure that would gradually increase rates for old capacity to avoided costs (Petition, Appendix G).

Allied's Inaction, Followed By Its Time-Barred Collateral Attack

Although the Commission's 1985 declaratory ruling arguably involved a reading of PURPA, Allied did not seek review in either state or federal court. Indeed, it accepted Niagara Mohawk's "contract rates" until 1986, at which time it brought a breach of contract action in civil court for the right to charge SC-6 rates from March 20, 1984 (when it demanded full avoided cost rates) to February 14, 1986 (when the phase-in procedure took hold).[5] The PSC intervened as a necessary party.

The State Courts' Interpretation of State Law

After reviewing Allied's arguments, three New York State courts concluded unanimously that the Commission's 1985 ruling precluded relitigation of

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[4] While the petitioner alleges that the Commission's 1985 ruling redefined PURPA's meaning of "qualifying facility" (Allied, 11, 14-16), the Commission's declaratory ruling demonstrates otherwise. Indeed, the Commission recognized that qualifying facilities could include old, as well as new, capacity, but it noted that FERC had expressly interpreted PURPA as not entitling "old" capacity to rates based on a utility's full avoided costs (Petition, Appendix F-7).

[5] Specifically, Allied argued that the utility had breached the 1981 agreement by failing to pay SC-6 tariff rates, and, therefore, was liable for the difference between the SC-6 avoided cost tariff rate and what it had actually paid under the contract.

Allied's alleged entitlement to full avoided cost rates. They, therefore, awarded summary judgment to Niagara Mohawk (Pet. App. A, C).[6]

Allied has now filed a petition for certiorari, claiming that the Commission's decision should not have been afforded *res judicata* effect because it was violative of PURPA and beyond the Commission's jurisdiction (Allied, 10, 11, 15, 22). Its position is fallacious.

[6] Allied's contention that Niagara Mohawk's failure to pay SC-6 tariff rates for Geddes' power was an "unquestionable breach" of the 1981 contract (Allied, 3) is astonishing, given the New York State courts' resolution of this controversy (Petition, App. A, C).

Summary of Argument

The Commission's 1985 ruling held that Allied's Geddes facility was not entitled to SC-6 rates (Petition, App. F-7). Allied did not seek judicial review, and New York State's highest court subsequently held Allied precluded by *res judicata* from relitigating the lawfulness of the Commission's ruling (Petition, App. A-7).

The United States Supreme Court has repeatedly found that it will not review a state court's interpretation of state law. Inasmuch as the New York Court of Appeals' *res judicata* holding was an interpretation of state law, Allied's petition for certiorari should be rejected.

In any event, Allied is simply wrong when it alleges that the Commission's ruling redefines PURPA's definition of qualifying facilities. The FERC regulations implementing PURPA state unequivocally that, unlike "new" capacity, "old" capacity, such as Allied's Geddes facility, is not entitled to rates based on avoided costs. 45 Fed. Reg. 12223.

Finally, Allied's claim that the Court of Appeals' holding implicitly conflicts with decisions of this and other Courts is baseless.

POINT I

Inasmuch as the New York Court of Appeals' decision turned solely on State law, Allied's petition for review does not raise a federal question.

Section 1257(3) of Title 28, the provision on which Allied grounds its petition for certiorari, requires that a party seeking review in this Court demonstrate a legitimate question of federal law. 28 U.S.C. §1257(3). Whether a ruling by a state agency should be given *res judicata* effect is a question of state law. *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U.S. 4, 7-8, 11 (1939). Thus, Allied's petition for certiorari offers no basis for reviewing the New York Court of Appeals' decision.[7]

Although collateral attacks on agency decisions have been allowed for the purpose of contesting subject matter jurisdiction, there can be no claim in this case that the Commission lacked jurisdiction to resolve Allied's dispute with Niagara Mohawk because Allied *asked* the PSC to issue a declaratory ruling on its claim for SC-6 tariff rates. Moreover, FERC has stated many times that state regulatory agencies have jurisdiction to set purchase power rates by means "reasonably designed to give effect to the [FERC's] rules." 45 Fed. Reg. 12231; 16 U.S.C. §824(f)(1).

If the doctrine of *res judicata* is to have meaning, a party cannot be permitted to sit on its rights under state law to review an agency decision and then obtain federal review by simply contending that the agency ruling involved a federal statute. Allied's petition should be denied.

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[7] While the Court will reexamine a State court's interpretation of state law when it appears to be an "obvious subterfuge to evade consideration of a federal issue" (*Mullaney, et al. v. Wilbur*, 421 U.S. 684 (1975)), there can be no serious contention in this case that the Court of Appeals attempted to evade a federal question. Indeed, New York's courts stood ready to review the Commission's 1985 ruling, but Allied failed to seek review within the requisite statute of limitations.

POINT II

In any event, the Commission's decision is absolutely consistent with PURPA.

Allied argues that the Court should grant its petition for certiorari because the Commission's 1985 ruling allegedly redefined PURPA's definition of qualifying facility by distinguishing "old" from "new" capacity (Allied, 11, 15, 24). FERC's regulations, however, emphasize the distinction between "old" and "new" capacity and expressly authorize state agencies to decide whether alternative power producers should be allowed to charge avoided cost rates for power generated by "old" capacity. 18 C.F.R. Section 292.304(b)(3).[8] In FERC's own words:

> For facilities, construction of which commenced before the enactment of PURPA, the Commission will permit the state regulatory agencies or nonregulated electric utilities to establish rates for purchases for full avoided costs, or at a lower rate, if the state regulatory authority or nonregulated electric utility determines that the lower rate will provide sufficient encouragement of cogeneration and small power production (45 Fed. Reg. 12223).

Thus, the suggestion that the Commission violated PURPA by denying Allied rates based on avoided costs is specious.

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[8] Because only "new capacity" is entitled to rates based on full avoided costs, owners of "old capacity" may charge these rates only if they establish that such rates are essential to their survival. 18 C.F.R. 292.304(b)(2) and (3). Allied made no attempt to make such a showing before the Commission.

POINT III

There is no conflict between the New York Court of Appeals' holding and decisions of other jurisdictions.

Allied suggests that review of the Court of Appeals' decision is needed to settle a conflict "with decisions rendered by this Court and the courts of last resort of other states" (Allied, 14). A review of the decisions cited by Allied, however, demonstrates no such conflict.[9]

First, Allied describes *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 416 (1983) as assuming that FERC's regulations entitled all qualifying facilities to rates based on full avoided costs (Allied, 14-15). The issue in *American Paper Institute, Inc.*, however, was whether FERC acted unlawfully in ordering utilities to pay rates equal to full avoided costs, not whether "old capacity" warranted such rates. Indeed, there was absolutely no debate or discussion of whether "old capacity" was entitled to avoided costs, nor could there be in the face of FERC's unequivocal statement that the avoided cost entitlement was limited to "new capacity" (45 Fed. Reg. 12223).[10]

Second, Allied cites *Bates Fabric, Inc. v. Public Utilities Commission*, 447 A2d 1211 (1982) as holding that old capacity is entitled to rates based on full avoided costs (Allied, 16). In fact, *Bates* simply stands for the proposition that PURPA denies a state regulatory commission power to modify a utility power

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[9] The Court of Appeals decision interprets the doctrine of *res judicata*, not PURPA, but even accepting Allied's assumption that the decision implicitly endorses the Commission's 1985 ruling, there is no conflict.

[10] The Court did not reference Part 292.304(b), which discussed the distinction between new and old capacity, because that regulation was not at issue.

purchase contract executed before PURPA's enactment. Indeed, the Main Supreme Court decided that neither state law nor PURPA gave the Maine PUC jurisdiction of such contracts and it, therefore, affirmed the Commission's decision refusing to resolve a dispute between Bates and a Maine utility. Of course, the holding has no application to this case because Allied's contract with Niagara Mohawk was executed *after* the implementation of FERC's regulations.

Third, the petitioner argues that the Court of Appeals' ruling is at odds with *Kansas City Power and Light Company v. State Corporation Commission*, 676 P.2d 764 (1984), app. dism. 479 U.S. 801 (1986) which held that PURPA preempted the states from setting rates above full avoided costs. Inasmuch as the Commission's 1985 ruling does not concern this question, there can be no serious contention that the Court of Appeals' *res judicata* decision is at odds with *Kansas City Power and Light.*

Finally, Allied claims that the Court of Appeals' decision contradicts its position in *Matter of Consolidated Edison Company v. Public Service Commission*, 63 N.Y. 424 (1984), app. dism. 470 U.S. 1075 (1985), which upheld the constitutionality of New York Public Service Law Section 66-c.[11] In that case, the Court of Appeals found that the Federal Power Act preempted the states from requiring utilities to purchase

[11] Section 66-c requires New York's electric utilities to purchase electricity from qualifying facilities at a minimum rate of six cents per kilowatt hour. On April 14, 1988, FERC issued a declaratory order preempting Section 66-c, but it stayed its order on June 15, 1988. FERC's action is now under judicial review.

energy from facilities that did not qualify as QFs under PURPA, but it found no such conflict with Section 66-c's six cent pricing provision.[12]

There is certainly no inconsistency between the Court of Appeals' *res judicata* holding in this case and its preemption decision in *Matter of Consolidated Edison Company.*

[12] Allied's petition appears to suggest that the Public Service Commission appealed the portion of the Court of Appeals ruling preempting Section 66-c's definition of QFs (Allied, 17-18). We did not. The only appeal in that case was that of Con Edison, which sought review of Section 66-c's six cent provision.

Conclusion

The New York State Court of Appeals' decision is consistent with settled *res judicata* doctrine. It involves no federal question and does not warrant further review. Moreover, the Public Service Commission's 1985 ruling represents a rational reading of FERC's regulations implementing PURPA. The petition for certiorari should be denied.

Respectfully submitted,

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